FEB 8 1957
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

No. 757

CITY OF ST. PETERSBURG, a Municipal Corporation, Organized and Existing under the Laws of the State of Florida, and JACK PURYEAR, As Director of the Bureau of Recreation of the City of St. Petersburg, Florida,
Petitioners,

vs.

FRED ALSUP, WILLET WILLIAMS, NAOMI WILLIAMS, RALPH WIMBISH, CHESTER JAMES, SR., and HAROLD DAVIS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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CITY OF ST. PETERSBURG, a Municipal Corporation, Organized and Existing under the Laws of the State of Florida, and JACK PURYEAR, As Director of the Bureau of Recreation of the City of St. Petersburg, Florida,
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FRED ALSUP, WILLET WILLIAMS, NAOMI WILLIAMS, RALPH WIMBISH, CHESTER JAMES, SR., and HAROLD DAVIS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause on December 19, 1956.

THE OPINION BELOW.

The opinion and judgment of the U. S. Court of Appeals for the Fifth Circuit is appended to this petition, pages A-1 to A-6.

JURISDICTION.

The grounds upon which the jurisdiction of this Court is invoked is that the question presented is an important question of Federal law that has not been decided by this Court but in view of its importance to this petitioner and to other municipalities of like nature it should be decided by the Supreme Court of the United States.

Statutory authority for the jurisdiction of this Court is contained in 28 U. S. Code, Sec. 1254(1).

QUESTION PRESENTED.

The petitioner took the sole position below that by the decisions of this Court and other courts of last resort that municipalities operating in their proprietary capacity are not in fact acting as an arm of the state nor exercising the police powers of the state and that the 14th Amendment of the Constitution being a limitation upon the acts of the states is not applicable to the proprietary operations of municipalities, thus but one question is presented:

ARE THE RESTRICTIONS CONTAINED IN THE 14TH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES APPLICABLE TO MUNICIPALITIES OPERATING IN THEIR PROPRIETARY CAPACITY?

CONSTITUTIONAL PROVISIONS INVOLVED.

This cause involves the application of Section 1 of the 14th Amendment of the Constitution:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE.

This case arose in the U. S. District Court for the Southern District of Florida wherein the respondents brought action for declaratory decree and for injunction, contending that they were negroes and were denied admission to the Spa Pool and bathing beach operated by the petitioner, City of St. Petersburg through petitioner Jack Puryear as its Director of Recreation and that the denial of admission was a violation of their rights under the provisions of the 14th Amendment. The petitioners admitted that negroes were denied admission to said Spa Pool and beach but denied their admission was in violation of the 14th Amendment by reason of the fact that the pool and beach was operated by the municipality in its proprietary capacity and that the 14th Amendment being a prohibition upon acts of the states, was not applicable to a municipality acting in its proprietary or private capacity. The District Court upon Motion for Summary Final Decree granted the injunction, and while holding that the municipality

did operate this utility in its proprietary capacity, it was nevertheless subject to the terms of the 14th Amendment. Appeal was taken by the petitioner to the U. S. Court of Appeals for the Fifth Circuit and on December 19, 1956, opinion and judgment was entered by said court sustaining the District Court, said opinion and judgment being appended to this petition.

REASONS FOR GRANTING THE WRIT.

As the pleadings disclose, the petitioner, City, operates its Spa Pool and breach as a business, charging a fee for admission and is financially unable to operate this utility at a loss. Petitioner's answer likewise alleges that under the present social system existing in this community, the operation of this pool and beach on a non-segregation basis would result in the closing of the pool and beach for lack of revenue and deprive the citizens of the city of this facility.

The above is not presented to this Honorable Court as an argument in support of our contention that the 14th Amendment is not applicable to certain operations of municipalities, but to show the importance of the question to the petitioner City, and to other cities in a similar situation, and why this court should review the judgment sought to be reviewed.

Further the petitioner would show to the court that the question presented here has not in fact been decided by the Supreme Court of the United States. The cases cited in the opinion of the Court of Appeals, while dealing with the 14th Amendment in essence present a different question than is presented here. *Trenton* v. *N. J.*, 262 U. S. 182, 191-192, was an effort upon the part of a municipality to in-

voke the protection of the 14th Amendment. *Nixon* v. *Condon*, 286 U. S. 73, 88, involved the right of suffrage which is clearly governmental in character.

In the case of *Dawson* v. *Mayor and City Council of the City of Baltimore*, 220 F. 2d 386, 350 U. S. 877, the question of a municipality operating in its proprietary function was not presented. It could not have been presented for the substantive law of the State of Maryland, Maryland municipalities operate pools and recreation in their governmental capacity. *Mayor and City Council of Baltimore* v. *State*, 195 Atl. 571.

On the other hand Florida cities by the substantive law of Florida operate swimming pools and beaches in their proprietary capacity. *Pickett* v. *City of Jacksonville*, 20 So. 2d 484, 155 Fla. 439; *Ide* v. *St. Cloud*, 8 So. 2d 924, 150 Fla. 835.

This Honorable Court has recognized the difference between the governmental operation and the proprietary operation of municipalities and the different rights, powers and duties applicable to each in *Vilas* v. *Manila*, 220 U. S. 345, and *South Carolina* v. *U. S.*, 199 U. S. 437.

CONCLUSION.

We respectfully ask this court to review a decision upon an important question that directly affects a municipal operation and a question that has not been directly presented to nor passed upon by this Court.

We sincerely request this Court to issue its Writ of Certiorari and review the judgment of the Fifth Circuit Court of Appeals.

Respectfully Submitted,

LEWIS T. WRAY,
HARRY I. YOUNG,
FRANK D. MCDEVITT,
City Hall,
St. Petersburg, Florida,
Attorneys for Petitioners.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

No. 16100.

CITY OF ST PETERSBURG, etc., and JACK PURYEAR, as Director of the Bureau of Recreation of the City of St. Petersburg, Florida, *Appellants*,

versus

FRED ALSUP ET AL.,
Appellees.

Appeal from the United States District Court for the Southern District of Florida.

(December 19, 1956.)

Before RIVES, TUTTLE and JONES, Circuit Judges.

RIVES, Circuit Judge: The district court enjoined the appellants from refusing to allow the appellees and other negroes similarly situated to use the municipal beach and swimming pool on the same basis as white citizens of the municipality. On the authority of *Dawson* v. *Mayor and City Council of the City of Baltimore*, 4th Cir., 220

F. 2d 386, affirmed 350 U. S. 877, the judgment should be affirmed, unless the cases are distinguishable.

The distinction urged by appellants is that the City of Baltimore operates its parks and swimming facilities in its governmental capacity,[1] while the City of St. Petersburg operates its swimming pool and beach in its proprietary capacity.[2] Further elaborating their position, the appellants argue in brief:

> "The appellant City operates the Municipal Spa Beach and swimming pool involved in this litigation in its proprietary capacity. Under the decisions of the Courts it has not only the right but the duty to operate this pool and beach as a business enterprise and for the best interest of the inhabitants of the City who are stockholders, so to speak, in this enterprise.
>
> "The answer avers in substance that the City operated a negro pool in the very heart of the negro area and that said pool operated at a considerable financial loss and was finally forced to close for lack of patronage. It is further alleged that, due to a long social practice and custom, if negroes were admitted to the beach and pool in controversy, white patronage would cease or practically cease and that the City would be forced to close this pool as it would not have sufficient funds to continue its operations.
>
> "If the City is to be charged with the duty and given the legal right to operate this utility as a private business and for the best interest of the inhabitants

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[1] *Mayor and City Council of Baltimore* v. *State*, 195 Atl. 571.

[2] *Town of Riviera Beach* v. *State*, 53 So. 2d 828; *Pickett* v. *City of Jacksonville*, 20 So. 2d 484; *Ide* v. *City of St. Cloud*, 8 So. 2d 924; *City of Tampa* v. *Easton*, 198 So. 753; *State* v. *City of Daytona Beach*, 158 So. 300; *City of Lakeland* v. *Amos*, 143 So. 744; *Hamler* v. *City of Jacksonville*, 122 So. 220.

of the City, the 14th Amendment has no application. It certainly cannot be said that a forced closing of the pool would be for the best interest of anyone.

"To hold that the 14th Amendment of the Constitution is applicable to a city operating in its proprietary capacity in the light of the numerous decisions defining this method of operation would be to read into the 14th Amendment something that simply is not there, nor ever was intended to be there."

It becomes obvious, at once, that, if appellants' contention be accepted, the Constitution would operate with different effect in Maryland and in Florida; and probably also in various other states. The same contention has been unsuccessfully urged to shield municipalities from their own states and was thus answered in *Trenton* v. *New Jersey*, 262 U. S. 182, 191-192:

"The distinction between the municipality as an agent of the State for governmental purposes and as an organization to care for local needs in a private or proprietary capacity has been applied in various branches of the law of municipal corporations. The most numerous illustrations are found in cases involving the question of liability for negligent acts or omissions of its officers and agents. See *Harris* v. *District of Columbia*, 256 U. S. 650, and cases cited. It has been held that municipalities are not liable for such acts and omissions in the exercise of the police power, or in the performance of such municipal faculties as the erection and maintenance of a city hall and courthouse, the protection of the city's inhabitants against disease and unsanitary conditions, the care of the sick, the operation of fire departments, the inspection of steam boilers, the promotion of education and the administration of public charities. On the other hand, they have been held liable when such acts or omissions occur in the exercise of the power to build and

maintain bridges, streets and highways, and waterworks, construct sewers, collect refuse and care for the dump where it is deposited. Recovery is denied where the act or omission occurs in the exercise of what are deemed to be governmental powers, and is permitted if it occurs in a proprietary capacity. The basis of the distinction is difficult to state, and there is no established rule for the determination of what belongs to the one or the other class. It originated with the courts. Generally it is applied to escape difficulties, in order that injustice may not result from the recognition of technical defenses based upon the governmental character of such corporations. But such distinction furnishes no ground for the application of constitutional restraints here sought to be invoked by the City of Trenton against the State of New Jersey. They do not apply as against the State in favor of its own municipalities. We hold that the City cannot invoke these provisions of the Federal Constitution against the imposition of the license fee or charge for diversion of water specified in the state law here in question." (Marginal footnotes omitted.)

The fact that under West Virginia decisions municipal operation of a swimming pool was a proprietary activity has been held by a district court not to alter the constitutional right of an individual citizen to equality of opportunity in the use of the pool. *Lawrence* v. *Hancock*, S. D. W. Va., 76 F. Supp. 1004, 1008.

A state cannot, by judicial decision or otherwise, remove any of its activities from the inhibitions of the Fourteenth Amendment. See *Nixon* v. *Condon*, 286 U. S. 73, 88. It is doubtful whether a municipality[3] may ever engage in purely private action that would not be action of the state. See *Civil Rights Cases*, 109 U. S. 3; *Buchanan* v.

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[3]Except possibly in some fiduciary capacity. See *Estate of Stephen Girard*, Pa. Sup. Ct., November 12, 1956, 25 L. W. 2214, 2215, m/s.

Warley, 245 U. S. 60. Certainly this is not such a case. In its operation of the municipal beach and swimming pool the City of St. Petersburg comes squarely within the broad class long ago defined in *Ex parte Virginia*, 100 U. S. 339, 347:

> "Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it."

It is no answer to say that the beach and pool cannot be operated at a profit on a nonsegregated basis, and that the City will be forced to close the pool. Of course, financial loss cannot justify illegal operation; and, unfortunate as closing the pool may be, that furnishes no ground for abridging the rights of the appellees to its use without discrimination on the ground of race so long as it is operated. *Department of Conservation and Development* v. *Tate*, 4th Cir., 231 F. 2d 615, 616.

The judgment is therefore

AFFIRMED.

A True Copy:

Teste:

John A. Feehan, Jr.,
Clerk.

By /s/ Clara R. James,
Deputy Clerk of the United States Court of Appeals for the Fifth Circuit.

(Seal)

Judgment.

Extract from the Minutes of December 19, 1956.

No. 16100.

CITY OF ST. PETERSBURG, etc., and JACK PURYEAR, as Director of the Bureau of Recreation of the City of St. Petersburg, Florida,

versus

FRED ALSUP ET AL.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, City of St. Petersburg, etc., and Jack Puryear, as Director of the Bureau of Recreation of the City of St. Petersburg, Florida, be condemned, *in solido*, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

* * *

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COMPLAINT.

Filed Nov. 30, 1955.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA * * * * TAMPA DIVISION.

FRED ALSUP, WILLET WILLIAMS, NAOMI WILLIAMS, RALPH WIMBISH, CHESTER JAMES, SR., AND HAROLD DAVIS,

Plaintiffs,

versus

CITY OF ST. PETERSBURG, A MUNICIPAL CORPORATION, ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF FLORIDA, AND JACK PURYEAR, AS DIRECTOR OF THE BUREAU OF RECREATION OF THE CITY OF ST. PETERSBURG, FLORIDA,

Defendants.

ACTION FOR DECLARATORY DECREE AND INJUNCTION.

This action is a proceeding for a judgment declaratory of the rights and other legal relations of the plaintiffs and all other Negroes who desire to use swimming and bathing facilities in the municipality of St. Petersburg, Florida as well as all others similarly situated and affected with reference to the matters here involved, and an injunction, for the purpose of determining and redressing questions and matters of actual controversy between the parties to wit:

(a) The question whether or not the action of defendants or either or any of them, in enforcing, executing or pursuing against the plaintiffs or any other Negro similarly situated, or either or any of them, the policy, custom, practice, and usage which deprives because of their race or color, plaintiffs and all other Negroes similarly situated, of the right and privileges, afforded all white persons as a matter of course, of admission to and use Municipal Spa Beach and Swimming Pool, the same being a recreational facility, tax supported and maintained and conducted by defendants or either or any of them affording opportunities, advantages and facilities for bathing and swimming denies plaintiffs, and other Negroes similarly situated their privileges and immunities as citizens of the United States, their liberty and property without due process of law and the equal protection of the laws, secured by the Fourteenth Amendment of the Constitution of the United States, Section 1 and the rights secured by Title 8, United States Code, Section 41 and is for these reasons unconstitutional and void.

II.

Plaintiffs are among those generally classified as Negroes, are citizens of the United States and of the State of Florida and are residents domiciled in the City of St. Petersburg, Florida. They now meet and at all times material have met, in all particulars, all of the lawful qualifications necessary for admission to swim or bathe or use the facilities of Municipal Spa Beach and Swimming Pool, and are now and at all times material herein have been ready willing and able to pay all lawful uniform fees and charges and to comply with all lawful uniform rules and regulations requisite to their admission thereto.

III.

Plaintiffs bring this action in their own behalf, there being common questions of law and fact of general interest to and affecting the right of all other Negroes who desire to swim and/or bathe at Municipal Spa Beach and Swimming Pool, similarly situated and affected with reference to the matters herein involved, who are so numerous as to make it impractical to bring them all before the Court and a common relief being sought, as will hereinafter more fully appear, bring this action, for themselves and for the benefit of all other Negroes who desire to swim and/or bathe at Municipal Spa Beach and Swimming Pool, similarly situated and affected with reference to the matters here involved.

IV.

The City of St. Petersburg, Florida exists pursuant to the Constitution and the Laws of the State of Florida and the Charter of the City of St. Petersburg, Florida, as a corporate municipality.

Defendant, Jack Puryear is duly appointed director of the Bureau of Recreation, a department of the City of St. Petersburg, Florida, and as such is subject to the authority of defendant City of St. Petersburg, Florida as an agent governing and controlling the several parks and playgrounds provided and established by the City of St. Petersburg, Florida, among these being Municipal Spa Beach and Swimming Pool.

The said defendant, Jack Puryear as agent for the defendant City of St. Petersburg, Florida acts pursuant to the orders, policies, practices, usages, and customs of,

and established by, defendant City of St. Petersburg, Florida.

V.

The State of Florida has declared public recreation a a governmental function. (Florida Statutes Annotated). The Florida Statutes, Chapter 418.03 provide:

"The governing body of any such municipality or county may establish a system of supervised recreation and it may, by resolution or ordinance, vest the power to provide, maintain and conduct playgrounds, recreation centers and other recreational activities and facilities in the school board, park board, or other existing body or in a playground and recreation board as the governing body may determine. Any board so designed shall have the power to maintain and equip playgrounds, recreation centers and the buildings thereon, and it may for the purpose of carrying out the provisions of this chapter, employ play leaders, play ground directors, supervisors, recreation superintendents, or such other officers or employees as they deem proper."

Charter of the City of St. Petersburg, Florida provides in Section 3, Sub Section (gg) that:

"Parks, playgrounds and recreational facilities. To establish, support, maintain, regulate and develop a system of public recreation, including parks, playgrounds, and other necessary facilities and activities thereto, and to provide for their conduct, and may dedicate and set aside for such uses any lands, buildings, or both, now owned by the city, or which may be acquired later in accordance with provisions of the Charter; with power to charge

and collect reasonable fees and charges for access to, or enjoyment of, any such facilities or activities."

Pursuant to this authority, defendant City of St. Petersburg, Florida has provided and established and is maintaining and conducting, a system of supervised recreation which includes playgrounds, recreation center and facilities for swimming and bathing. The Municipal Spa Beach and Swimming Pool is a part of this supervised system of recreation; it affords opportunities, advantages and facilities for swimming and bathing. All persons who are not considered to be of Negro descent, who meet the qualifications and pay the fees and charges and comply with the rules and regulations requisite to admission thereto, have been, and are, afforded as a matter of course, the right and privilege of admission and use thereof.

VI.

The general control, management and authority over all land set aside for recreation purposes is in the hand of the defendant City of St. Petersburg, Florida. The Charter of defendant City of St. Petersburg, Florida provides:

Section 3. Powers, Rights, Liabilities, and Etc. (K):

To acquire by purchase, condemnation or otherwise, and to construct, maintain and operate within and without its corporate limits, wharves, warehouses, ship channels, breakwaters, jetties, water works, light plants, power plants, telephone systems, transportation systems, parks, driver, hospitals, and all other public buildings, places, structures, works and institutions, and for the carrying

out of such purposes shall have power to make the necessary contracts in connections therewith.

Defendant, Jack Puryear, as Director of the Bureau of Recreation, an agency of defendant, City of St. Petersburg, Florida is delegated to act within his capacity in determining who is to be granted admission to the use of any of the city's recreational facilities.

VII.

Defendant, and each of them, and their agents and employees, have enforced, executed, and pursued, and are executing and pursuing against plaintiffs and all other persons, similarly situated, and considered to be of Negro descent, the policy, practice, custom, usage of denying them because of their race or color, admission to and use of the Municipal Spa Beach and Swimming Pool for the purpose and bathing therein. This policy, practice, custom and usage deprives, because of their race or color, plaintiffs, and all other persons, similarly situated, considered to be of Negro descent, of the right and priviledge, of the said beach and swimming pool, afforded all white persons as a matter of course.

VIII.

On or about August 21, 1955, at the time that defendants were admitting white persons to swim and bathe at Municipal Spa Beach and Swimming Pool, and permitting white persons to use and avail themselves of the opportunities, advantages and facilities of the said Municipal Spa Beach and Swimming Pool, plaintiffs, Fred Alsup, Willet Williams, Naomi Williams, Ralph Wimbish, Chester James Sr., and Harold Davis duly applied for admission to

go upon Municipal Spa Beach and Swimming Pool for the purpose of swimming and bathing. Each of said plaintiffs was, because of his color, refused admission to Municipal Spa Beach and Swimming Pool or go to upon the said beach and swimming pool, or to use or avail himself of the opportunities, advantages or facilities of said Beach and Swimming Pool, by defendant, Jack Puryear, his agents, servants, and employees, nothwithstanding the fact that they were willing to pay all requisite fees and meet all uniform regulations.

On or about September 8, 1955, plaintiffs and each of them in their own behalf and on behalf of all other Negroes similarly situated who desire to avail themselves of the facilities of the Municipal Spa Beach and Swimming Pool, formally petitioned defendant Jack Puryear as director of the Bureau of Recreation informing him of the discrimination aforesaid and requesting that he, and his agents forthwith cease and desist from enforcing, executing or pursuing against the plaintiffs, or any other Negro similarly situated, or either or any of them, the policy, practice, custom or usage hereinbefore specified in paragraph VII and VIII hereof from establishing, enforcing, executing or pursuing against them, or either or any of them any other policy, practice, custom or usage herein or engaging in any other action which deprives them or any of them, because of their race or color, of the right and privilege of admission to and use of Municipal Spa Beach and Swimming Pool or which precludes because of their race or color, the admission of or use by plaintiff, or any other Negro similarly situated or any of them to and any beach or pool provided, established maintained or conducted for persons similarly situated to any public swimming pool or beach conducted for persons similarly situated of any race, color or group,

at the same time, and upon the same terms and conditions and with the same treatment, that persons similarly situated of any race, color, or group are admitted, afforded and given therein, on the grounds that such policies, practices, customs, usages and actions, and each of them deny plaintiffs, and other Negroes similarly situated their liberty and property without due process of law and the equal protection of laws secured by the Fourteenth Amendment to the Constitution of the United States, Section 1, and the rights secured by Title 8, United States Code, Section 41, and are for these reasons unconstitutional and void, and they afford plaintiffs and other Negroes similarly situated, and each and all of them when requested, the right and privilege of admission to and use of the Municipal Spa Beach Swimming Pool, and of any public beach or swimming pool provided, established, maintained or conducted by them or either of or any of them and persons similarly situated of any race, color or group, affording opportunities, advantages and facilities for swimming and bathing, at the same time and upon the same terms and conditions, and with the same treatment, that persons similarly situated of any race, color or group, are admitted, their privileges and immunities as citizens of the United States, their liberty, property without due process of law, and the equal protection of the laws secured by the Fourteenth Amendment of the Constitution of the United States and would therefore be unconstitutional and void, but said defendant has failed and refused to act favorably upon the plaintiffs' request and continue to and unless restrained and enjoined by this court from doing so, will continue to enforce, execute and pursue said policies, practices, customs and usages and to engage in such action.

X.

On or about September 20, 1955, plaintiffs and each of them in their own behalf petitioned the City of St. Petersburg, Florida, through its Mayor, Samuel Johnson and its Councilmen, J. G. Murphy, William Carroll, Auldon Dugan, Ed. F. Brantley, Mrs. Chester G. Edward, and Mr. Chase, for themselves and all other Negroes similarly situated, setting forth the deprivation hereinbefore stated in paragraph IX and requesting that the City of St. Petersburg, Florida, its agents, servants and employees, cease and desist from the practice of denying admission to and use of Municipal Spa Beach and Swimming Pool of the plaintiffs and all other Negroes similarly situated and alleging thereon that such existent practice was unconstitutional and void, but said defendant, as well as its agents, servants and employees have refused to act favorably upon plaintiff's request and continue unless restrained and enjoined by this Court from doing so, will continue to enforce, execute and pursue said policies, practices, customs and usages and to engage in such action, and each and all of them.

XI.

Plaintiffs, and all other Negroes similarly situated, are denied the right and privilege of admission to and use of the Municipal Spa Beach and Swimming Pool, as aforesaid, on the basis of and because of their race or color.

XII.

It is impossible for plaintiffs, or any other Negro similarly situated, or either or any of them to secure of obtain public opportunities, advantages, or facilities for swim-

ming or bathing afforded and available to persons similarly situated who are not Negroes as long as defendants, or either or any them or their agents or employees, enforce, execute or pursue against plaintiffs, or any Negro similarly situated, the policy, practice, custom and usage hereinbefore specified in paragraph VII hereof, or establish, enforce, execute or pursue against them, or either of them any policy, practice, custom or usage, or engage in any other action, which deprives them, or either or any of them, because of their race or color, of the right and privilege of admission to or use of the Municipal Spa Beach and Swimming Pool, or which deprives them, or either or any of them, because of their race or color, of the right and privilege of admission to or use of the only public course provided, established, maintained or conducted by defendants or either or any of them, affording opportunities, advantages and facilities for Swimming and Bathing, or which makes any distinction' on the basis of race or color, in the consideration of any applicant for admission as a swimmer or bather to any public beach or pool provided, established, maintained or conducted for persons similarly situated of any race, color or group, or which precluded because of their race or color, the admission of or the use by plaintiffs, or any other Negro similarly situated to and of any public beach or pool, established, maintained or conducted for persons similarly situated of any other race, color or group, at the same time, and upon the same terms and conditions, and with the same treatment, that persons similarly situated of any race, color or group are admitted, afforded and given therein.

XIII.

The action of defendants, and each of them, in enforcing, executing and pursuing against plaintiffs, or any other Negro similarly situated or either or any of them, the policy, practice, custom and usage hereinbefore specified in paragraph VII hereof, or in establishing, enforcing, executing or pursuing against them, either or any of them, any other policy, practice, custom or usage, or in engaging in any other action, which deprives them, or either or any of them, because of their race or color, of the right and privilege of admission to and use of the Municipal Spa Beach and Swimming Pool, or which deprives them, or either or any of them, because of their race or color, of the right and privilege of admission to and use of a facility provided, established, maintained or conducted by defendants, or either or any of the right and privilge of admission to and use of a public beach and pool provided, established, maintained or conducted by defendants, or either or any of them, affording opportunities, advantages and facilities for swimming, or which makes any distinction, on the basis of race or color, in the consideration of any applicant for admission as a swimmer or bather to any public beach or pool provided, established, maintained or conducted for persons similarly situated of any race, color or group, or which precludes, because of their race or color, the admission of or the use by plaintiffs, or any other Negro similarly situated, or either or any of them, to and of any public beach or pool provided, established, maintained or conducted for persons similarly situated of any other race, color or group, at the same time, and upon the same terms and conditions, and with the same treatment, that persons similarly situated of any other race, color or group are admitted, afforded and given therein, denies plaintiffs, and other

Negroes similarly situated, their privilege and immunities as citizens of the United States, their liberty and property without due process of law, and the equal protection of the laws, secured by the Fourteenth Amendment of the Constitution of the United States, Section 1 and the rights secured by Title 8, United States Code 41, and is for these reasons unconstitutional and void.

XIV.

Plaintiffs, and those similarly situated and affected on whose behalf this action is brought are suffering irreparable injury and are threatened with irreparable injury in the future by reasons of the policies, practices, usages, and customs, and the actions of defendants, herein complained of. They have no plain, adequate or complete remedy to redress the wrongs and illegal acts herein complained of other than this action for a declaratory judgment and an injunction. Any other remedy to which plaintiffs and those similarly situated could be remitted would be attended by such uncertainties and delays as to deny substantial relief, would involve a multiplicity of suits, and would cause further irreparable injury and occasion damage, vexation and inconvenience.

Wherefore, plaintiffs respectfully pray that, upon the filing of this complaint, as may appear proper and convenient to the Court, that this Court advance this action on the docket and order a speedy trial of this action according to law, and upon such hearing.

(a) This Court adjudge, decree and declare the rights and legal relations of the parties to the subject matter herein controversy in order that such declaration shall have the force and effect of a final judgment or decree.

(b) This Court enter a judgment or decree declaring that the action of defendants, and each of them, in enforcing, executing or pursuing against plaintiffs, or any other Negro similarly situated, or either or any of them, the policy, practice, custom and usage hereinbefore specified in paragraph VII hereof, or in establishing, enforcing, executing or pursuing against them, or either or any of them, and other policy, practice, custom, or usage which deprives them, or either or any of them because of their race or color, of the right and privilege of admission to and use of the Municipal Spa Beach and Swimming Pool provided, established, mantained or conducted for persons similarly situated of any race, color or group or which precludes, because of their race or color, the admission of or the use by plaintiffs, or any public beach or swimming pool provided, established, maintained or conducted for persons similarly situated of any race, color or group, at the same time, and upon the same terms and conditions, and with the same treatment, that persons similarly situated of any other race, color or group are admitted, afforded and given herein, denies plaintiffs, and other Negroes similarly situated, their privileges and immunities as citizens of the United States, their liberty and property without due process of law, and the equal protection of the laws, secured by the Fourteenth Amendment of the Constitution of the United States, section 1, and the rights secured by Title 8, United States Code section 41, and is therefore unconstitutional and void.

c) This Court enter a judgment or decree declaring that this action of defendants, and each of them, in depriving plaintiffs, or any other Negroes similarly situated, or either or any of them, because of their race or color, of the right and privilege of admission to and use of, Municipal Spa Beach and Swimming Pool, or any other

action which deprives them, or either or any of them, because of their race or color, of the right and privilege of admission to and use of a public beach and swimming pool, established, maintained or conducted by defendants, or either or any of them, affording opportunities, advantages and facilities for swimming or bathing, or which makes any distinction, on the basis of race or color, in the consideration of any applicant for admission as a swimmer to any public beach or pool provided, established maintained or consideration for persons similarly situated of any race, color or group, or which precludes, because of their race or color, the admission of or use by plaintiffs, or any other Negro similarly situated, to and of any public beach or pool, established, maintained or conducted for persons similarly situated of any race, color or group, at the same time, and upon the same terms and conditions, and with the same treatment, that persons similarly situated of any other race, color or group are admitted, afforded and given therein, denies plaintiffs, and other Negroes similarly situated, their privileges and immunities as citizens of the United States, their liberty and property without due process of law, and the equal protection of the laws, secured by the Fourteenth Amendment of the Constitution of the United States, section 1, and the rights secured by Title 8, United States Code, section 41, and is therefore unconstitutional and void.

(d) This Court enter a permanent injunction perpetually restraining and enjoining defendants, and each of them, their successors in office and their agents and employees, forthwith, from enforcing, executing or pursuing against plaintiffs, or any other Negro similarly situated, or either or any of them, because of their race or color, of the right and privilege of admission to and use of the Municipal Spa Beach and Swimming Pool provided, es-

tablished, maintained and conducted by defendants, or either or any of them, affording opportunities, advantages and facilities for swimming or bathing or which makes any distinction, on the basis of race or color, in the consideration of any applicant for admission as a swimmer or bather to any public beach or pool provided, established, maintained or conducted for persons similarly situated of any race, color or group, or which precludes, because of their race or color, the admission or the use of the beach, by the plaintiffs or any other Negro similarly situated, or either or any of them, to and of any public beach or pool provided, established, maintained or conducted for persons similarly situated of any race, color or group, at the same time, and upon the same terms and conditions, and with the same treatment, that persons similarly situated of any other race, color or group are admitted, afforded and given therein, upon the ground that such policies, practices, customs, and usages, and each of them, deny plaintiffs, and other Negroes similarly situated, their privileges and immunities as citizens of the United States, their liberty and property without due process of law and the equal protection of the laws, secured by the Fourteenth Amendment of the Constitution of the United States, section 1, and the rights secured by Title 8, United States Code, section 41 and are therefore unconstitutional and void.

(e) This Court enter a permanent injunction perpetually restraining and enjoining defendants, and each of them, their successors in office, and their agents and employees, forthwith, from any and all action which deprives plaintiffs, or any other Negro similarly situated, or either or any of them, because of race or color, of the right and privilege of admission to and use of Municipal Spa Beach and Swimming Pool, or which deprives them, or

either or any of them, because of their race or color, of the right and privilege, of admission to and use of any public beach or pool, established, provided, maintained or conducted by defendants, or either or any of them, affording opportunities, advantages and facilities for swimming or which makes any distinction, on the basis of race or color in the consideration of any applicant for admission as swimmer or bather to any public beach or pool provided, established, maintained or conducted for persons similarly situated of any race, color or group; or which precludes, because of their race or color, the admission of or the use by plaintiffs, or any other Negro similarly situated to and of any public beach or pool provided, established, maintained or conducted for persons similarly situated of any race, color or group, at the same time, and upon the same terms and conditions, and with the same treatment, that persons similarly situated of any other race, color or group are admitted, afforded and given therein, upon the ground that such actions, and each of them, deny plaintiffs, and other Negroes similarly situated, their privileges and immunities as citizens of the United States, their liberty and property without due process of law, and the equal protection of the laws, secured by the Fourteenth Amendment of the Constitution of the United States section 1, and the rights secured by Title 8, United States Code, section 41, and are therefore unconstitutional and void.

(f) This Court allow plaintiffs their costs herein, and grant such further other, additional or alternative relief as may appear to the Court to be equitable and just in the premises.

WILLET WILLIAMS,
(Willet Williams),
RALPH M. WIMBISH, M. D.
(Ralph Wimbish),

HAROLD J. DAVIS,
(Harold Davis),
FRED W. ALSUP, M. D.
(Fred Alsup),
NAOMI WILLIAMS,
(Naomi Williams),
CHESTER JAMES, SR.,
(Chester James, Sr.,),
Plaintiffs.
FRANCISCO A. RODRIGUEZ,
(Francisco A. Rodriguez),
Counsel for Plaintiffs.

703 Harrison Street,
Tampa 2, Florida.

HAROLD A. JACKSON,
(Harold A. Jackson),
Counsel for Plaintiffs.

1024 Central Avenue,
Tampa 2, Florida.

State of Florida
County of

Fred Alsup, Willet Williams, Naomi Williams, Ralph Wimbish, Harold Davis, and Chester James, Sr., being first duly sworn, says that they are the plaintiffs in the foregoing action; that they have read the foregoing action; and that the same is true of their own knowledge, except as to those matters therein stated upon information and belief, and as to those matters, they believes them to be true.

CHESTER T. JAMES, SR.,
FRED W. ALSUP, M. D.
HAROLD J. DAVIS,
RALPH M. WIMBISH, M. D.,
WILLET WILLIAMS,
NAOMI WILLIAMS.

Sworn to and subscribed before me this 28 day of November, 1955.

THOMAS BROWN,
Notary Public, State of Florida,
at large.

My Commission expires July 23, 1957.

Bonded by American Surety Co. of N. Y.

ANSWER.

Filed Dec. 21, 1955.

In the United States District Court for the Southern District of Florida—Tampa Division.

Fred Alsup, Willet Williams, Naomi Williams, Ralph Wimbish, Chester James, Sr., and Harold Davis, Plaintiffs.,

vs. Civil No. 2860.

City of St. Petersburg, a municipal corporation, etc., and Jack Puryear, as Director of the Bureau of Recreation of the City of St. Petersburg, Florida, Defendants.

Come now the defendants City of St. Petersburg, a municipal corporation of the State of Florida and Jack Puryear, Director of the Bureau of Recreation of the City of St. Petersburg, and answering the complaint filed herein say:

1.

They admit the allegations of fact contained in said complaint but deny that their refusal to permit the negroes the use of the Spa Beach and swimming pool is a violation of their rights under the 14th Amendment of the Constitution of the United States and further answering said complaint say:

2.

That the Municipal Spa Beach and swimming pool is operated by the City of St. Petersburg in its proprietary capacity, charges being made for the use of said facilities and that under the law, the City of St. Petersburg has the right and duty to operate said Municipal Spa Beach and swimming pool as would a private corporation as a business enterprise.

3.

Defendants aver that during the months of May through September of the current year, the City of St. Petersburg operated a swimming pool for negroes, the same being known as the Jennie Hall Pool. That during the operation of the pool very few negroes patronized said pool, although it was located at the very center of the accepted negro residential area; that during the 5 months of operation the Jennie Hall Pool operated with an approximate 85% loss on said operation and that in September the pool was closed for lack of patronage. The defendants aver that they now have this pool available and ready for continued operation if it would be demonstrated that said pool could be operated on a self supporting basis or so near self supporting that there would not be an intol-

erable burden upon the taxpayers of the defendant City, to make up the deficit.

4.

Defendants aver that at the time the plaintiffs sought admission to the Municipal Spa Beach and swimming pool as alleged in paragraph 7 of the complaint, that the Jennie Hall pool for negroes was still open and available and was being operated as aforesaid at a tremendous deficit by the city.

5.

Further answering, the defendants would show unto the Court that for many years in the State of Florida it has been the custom and practice to provide separate but appropriate facilities for negroes and that this custom has been recognized by the Courts and has become through the years an accepted social usage and custom so pronounced that it is impossible to bring an abrupt change in said social custom; that in the event negroes were admitted to the Municipal Spa Beach and swimming pool, white patrons in said pool would cease or so nearly cease that white patronage of said pool would be negligible and that it has been demonstrated by the operation of the Jennie Hall pool in the City of St. Petersburg that there would not be sufficient negro patronage of the Spa Beach and swimming pool to in any way defray the cost of the operation of said pool, which is a long distance from any negro residential area.

The defendants aver that the City of St. Petersburg does not have sufficient tax funds to enable it to operate the Spa pool and beach with a substantial deficit to be made

up by the use of tax moneys and that the net results of the admission of the negroes to Spa Beach and swimming pool would be the closing of said beach and swimming pool which would not benefit either the white or negro races.

Further answering the defendants aver that the exclusion of negroes to the Municipal Spa Beach and swimming pool is the only practical business policy that could be adopted by the City of St. Petersburg in an effort to continue the operation of said pool.

LEWIS T. WRAY,
HARRY I. YOUNG,
PAUL MACEWITT,
CARL LINN,
Attorneys for defendants.

City Hall,
Municipal Building,
St. Petersburg, Florida.

I Hereby Certify that I have furnished by mail, a copy of the foregoing answer to Mr. Harold A. Jackson, 1024 Central Avenue, Tampa, Florida and Mr. Francisco A. Rodriguez, 703 Harrison Street, Tampa, Florida, attorneys for plaintiffs, this 20th day of December, 1955.

HARRY I. YOUNG,
Attorney.

MOTION FOR SUMMARY JUDGMENT.

Filed Dec. 29, 1955.

(Title Omitted.)

Comes now the plaintiffs and pursuant to Federal Rules of Civil Procedure 56 (a) respectfully move for a Summary Judgment against the above named defendants, upon the pleadings on file in said cause, on the ground that there is no genuine issue as to any material fact, and that the plaintiffs are entitled to judgment as a matter of law.

By FRANCISCO A. RODRIGUEZ,
(Francisco A. Rodriguez).

703 Harrison Street,
Tampa 2, Florida.

HAROLD A. JACKSON,
(Harold A. Jackson),
Attorneys for Plaintiffs.

I certify that a copy of the above and foregoing Motion for Summary Judgment was on the 29th day of December, 1955, mailed to the office of Lewis T. Wray, Harry I. Young, Frank D. McDevitt, and Carl Linn, Attorneys for Defendants, City Hall Municipal Building, St. Petersburg, Florida.

By FRANCISCO A. RODRIGUEZ,
(Francisco A. Rodriguez),
Attorney for Plaintiffs.

FINAL DECREE.

Filed Mar. 22, 1956.

In the United States District Court for the Southern District of Florida—Tampa Division.

Fred Alsup, Willet Williams, Naomi Williams, Ralph Wimbish, Chester James, Sr., and Harold Davis, Plaintiffs,

vs. Civil No. 2860

City of St. Petersburg, a Municipal Corporation, etc., and Jack Puryear, as Director of the Bureau of Recreation of the City of St. Petersburg, Florida, Defendants.

This cause coming on to be heard upon plaintiff's Motion for Summary Final Decree on the Pleadings and the Court having heard argument of counsel and being fully advised in the premises, does hereby find and decree:

FINDINGS OF FACT.

The factual situation is admitted. The Complaint alleges that the defendants operate a swimming pool and bathing beach called Spa Pool and Beach from which negroes are excluded by reason of the fact that they are negroes and in violation of the provisions of the 14th Amendment to the Constitution of the United States. The Answer of the defendants admit that negroes are barred from said swimming pool and bathing beach but deny that the exclusion of negroes from said pool and beach is in violation of the 14th Amendment but assert that in the operation of said swimming pool and bathing beach the City is acting in its proprietary capacity and therefore is not within the restrictions imposed by the 14th Amendment.

CONCLUSION OF LAW.

It is admitted that the swimming pool and bathing beach is operated on a fee basis and the defendants having alleged that said pool and bathing beach is operated by the City in its proprietary capacity, this court can concede that to be the fact. Nevertheless, it is the opinion of this Court that the capicity in which the municipality operates its swimming pool and beach is immaterial and regardless of the capacity in which the municipality may operate the pool, its operation is subject to the provisions of the 14th Amendment of the Constitution of the United States and therefore the plaintiffs are entitled to the relief sought.

Now, therefore, it is Ordered, Adjudged and Decreed that the defendants be restrained and enjoined from refusing to allow plaintiffs and other negroes similarly situated to make use of the municipal Spa swimming pool and beach on the same basis as white citizens of the municipality.

It is further Ordered that defendants, their agents, employees and servants be restrained and enjoined from promulgating any rule or regulation for the purpose of segregating the races in the use of said municipal Spa pool and bathing beach.

Done and ordered at Tampa, Florida, this 22 day of March, 1956.

ILLEGIBLE,
U. S. District Judge.

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS.

Filed Mar. 22, 1956.

In the District Court of the United States in and for the Southern District of Florida—Tampa Division.

Fred Alsup, Willet Williams, Naomi Williams, Ralph Wimbish, Chester James, Sr., and Harold Davis, Plaintiffs,

vs. Civil No. 2860.

City of St. Petersburg, a Municipal Corporation, etc., and Jack Puryear, as Director of the Bureau of Recreation of the City of St. Petersburg, Florida, Defendants.

Notice is hereby given that the City of St. Petersburg, a municipal corporation, organized and existing under the Laws of the State of Florida, and Jack Puryear, as Director of the Bureau of Recreation of the City of St. Petersburg, Florida, defendants herein, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the Final Decree of the District Court of the United States for the Southern District of Florida, Tampa Division entered on March 22, 1956.

HARRY I. YOUNG,
(Harry I. Young),
Of Counsel for Defendants.

City Hall, Municipal Bldg.,
St. Petersburg, Florida.

I Hereby Certify that I have furnished by mail a copy of the foregoing Notice of Appeal to the United States Court of Appeals to Mr. Harold A. Jackson, 1024 Central Ave., Tampa, Florida, and Mr. Francisco A. Rodiguez, 703

Harrison Street, Tampa Florida, attorneys for the plaintiffs, this 22nd day of March 1956.

HARRY I. YOUNG,
(Harry I. Young),
Of Counsel for Defendants.

MOTION TO SUSPEND FINAL DECREE AND INJUNCTION.

Filed Mar. 22, 1956.

(Title Omitted.)

Comes now the City of St. Petersburg and Jack Puryear, defendants in the above entitled cause and would show unto the Court that the issue presented in this cause is one of great importance; that it involves the method of operation of an entire department of the City and therefore moves the court to suspend and supersede the final decree and the order of injunction contained therein pending the appeal of said cause.

HARRY I. YOUNG,
Of Counsel for Defendants.

ORDER.

Filed Mar. 22, 1956.

(Title Omitted.)

This cause coming on to be heard upon Motion filed by the defendants to suspend the final decree and the order

of injunction contained therein, and it appearing to the Court that no great injury would result in the suspension of the final decree and the injunction pending the appeal in said cause;

Now, Therefore, it is Ordered, Adjudged and Decreed that the final decree heretofore entered by this Court be suspended and that the order of injunction contained therein be suspended and superseded pending the appeal.

Done and Ordered at Tampa, Florida, this 22 day of February, 1956.

ILLEGIBLE,
U. S. District Judge.

DESIGNATION OF CONTENTS OF RECORD ON APPEAL.

Filed April, 1956.

(Title Omitted.)

Pursuant to the Federal Rules of Civil Procedure, the defendants-appellants hereby designate for inclusion in the record on appeal to the United States Court of Appeals for the Fifth Circuit, taken by notice of appeal filed March 22, 1956, the entire record in said cause, to-wit:

1. The complaint.

2. The answer.

3. The motion for summary judgment.

4. Final decree.

5. Notice of appeal.

6. Motion to suspend final decree and injunction.

7. Order on motion to suspend final decree and injunction.

8. This designation.

LEWIS T. WRAY,
HARRY I. YOUNG,
Attorneys for defendants-appellants.

Municipal Building,
St. Petersburg, Florida.

I Hereby Certify that I have furnished by mail a copy of the foregoing to Mr. Harold A. Jackson, 1024 Central Avenue, Tampa, Florida, and Mr. Francisco A. Rodriguez, 703 Harrison Street, Tampa, Florida, attorneys for plaintiffs-appellees, this 11th day of April, 1956.

HARRY I. YOUNG,
(Harry I. Young),
Of counsel for Defendants-Appellants.

CLERK'S CERTIFICATE.

United States of America,
Southern District of Florida.

I, JULIAN A. BLAKE, Clerk of the United States District Court for the Southern District of Florida, and as such the legal custodian of the records and files of said Court, do hereby certify that the foregoing photostated pages, numbered from 1 to 26, inclusive, contain a full, true and correct copy of the Transcript of Record in a cause lately pending in said Court in the matter of Fred Alsup, Willet Williams, Naomi Williams, Ralph Wimbish, Chester James, Sr., and Harold Davis, Plaintiffs, vs. City of St. Petersburg, a Municipal Corporation, organized and existing under the laws of the State of Florida, and Jack Puryear, as Director of the Bureau of Recreation of the City of St. Petersburg, Florida, Defendants, prepared in accordance with and as requested by directions to the Clerk, as same appears among the files and records of this Court.

In Witness Whereof, I hereunto set my hand and affixed the official seal of this Court, this the 13th day of April, A. D. 1956.

JULIAN A. BLAKE,
Clerk, United States District Court Southern District of Florida.
By BETTY HANSEN,
Deputy Clerk.

(Seal)